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Patronising the mentally disordered? Social landlords and the control of anti-social behaviour under the Disability Discrimination Act 1995

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(1) Introduction

The recently enacted Disability Discrimination Act 2005 will extend and intensify the protection from discrimination afforded to disabled people by the Disability Discrimination Act 1995 ('the DDA').[1] This may seem a welcome development: the original legislation, an expedient enacted reluctantly in the face of an increasingly vocal Disability Rights Movement, has long been criticised as less than comprehensive. In recent months, however, litigation has raised new concerns that as it stands the DDA, a 'hasty and unwieldy political compromise',[2] may in certain contexts be over-inclusive, with unforeseen and unwelcome ramifications for other aspects of social policy. The particular issue highlighted by the leading case of *Manchester City Council v Romano and Samari*,[3] which this article explores, is the tension between the duty of social landlords not to discriminate against the mentally disordered, and their responsibility to protect the residents of social housing from so-called 'anti-social behaviour'. Sections 22 to 24 of the DDA, which prohibit discrimination in housing provision, restrict the circumstances in which a landlord can take action to control anti-social behaviour 'related' to certain mental disorders. In particular, exclusion from social housing on grounds of

such conduct, through either refusal to allocate property, or eviction, will be discriminatory, and therefore illegal, unless it can be justified as necessary to protect the health or safety of other residents.

The first part of this paper positions the DDA against the backdrop of contemporary housing policy, as characterised by followers of Foucault's work on governmentality.[4] It notes that whilst access to the sector is ostensibly governed by the principle of need, this welfarist objective has been subverted in the face of the anxieties of what Nikolas Rose describes as advanced liberal government;[5] in particular, the threat posed by certain categories of 'risky' subject.[6] In an effort to combat anti-social behaviour, occupation of social housing is presented as conditional upon the exercise of responsible moral agency. For those who fail to align their conduct accordingly, that conditionality may be enforced, with an individual excluded from the sector notwithstanding his need. Two rationalities are employed to justify departure from welfarism in such circumstances. On the one hand, exclusion is viewed as necessary to control risks that a provider is unwilling or unable to underwrite. On the other, those who fail to satisfy the conditions of their occupation are characterised as *morally irresponsible*; personally blameworthy for their failure to take responsibility for their conduct, and as such undeserving of the benefit of occupation within the sector.

The paper goes on to draw attention to the problems that arise when these justifications for exclusion, grounded in rationalities of risk and responsibility, are applied to the paradigm of the mentally disordered tenant.

Key to this analysis is the premise that diagnosis of a mental disorder brings individuals within what sociologists term the 'medical model'; an interpretive tool used to explain a range of deviant behaviour. The medical model, I argue, operates according to particular governmental rationalities, in tension with those evident within housing policy. First, under the medical model, health and welfare professionals are engaged as sources of expert knowledge (and power) relating to the management of the risky subject. Their focus upon reduction of risk through the inclusionary techniques of treatment and support may conflict, however, with the exclusionary risk strategies employed by housing managers. Second, the medical model problematizes the rationality of the morally irresponsible anti-social tenant. It treats the mentally disordered as incapable of responsible agency, and therefore blameless for their actions. Rather than morally irresponsible the mentally disordered are constructed as *morally non-responsible*, challenging the appropriateness of their subjection to the moral obligations of conditional housing provision. As the paper explores, however, this assumption of non-responsibility is itself controversial. Both moral philosophers and mental health professionals question whether medical classification of a mental disorder should always absolve an individual of the capacity for responsible agency. Indeed, moral discourses continue to operate in relation to the anti-social behaviour of the mentally disordered, with individuals, in certain circumstances, expected to take responsibility for their behaviour.

The second and final part of the paper argues that criticism levelled at the restrictions on conditionality imposed by the DDA mirror the discourses of advanced liberal housing policy. It notes first the explicit concern of the Court of Appeal in *Romano* with the management of risk through exclusion: that the 'health and safety' justification is inadequate to ensure protection of other residents and providers from the full range of threats posed by the mentally disordered, and its consequent attempt to neutralise the legislation. However, the paper then explores a further, implicit, concern that the DDA incorporates into law the medical model's assumption of non-responsibility. By precluding exclusion (in the absence of a risk to health or safety) simply on grounds of a causal mental disorder, an individual is no longer obliged to exercise responsible agency as a condition of his occupation, even when he might be deemed capable of doing so. This outcome has two consequences. Principally, the legislation limits the ability of providers to shape the conduct of anti-social tenants through conditionality. It has been suggested, however, that the DDA is a threat not only to providers, but the mentally disordered themselves, by patronising those it seeks to protect. Its assumption that the mentally disordered as a class are intrinsically incapable of responsible agency is arguably as an affront to their dignity, which anti-discrimination law in particular purports to champion.

The paper concludes, however, by questioning whether the power to encourage responsible moral agency amongst the mentally disordered through conditionality is really of greater value than tackling their social exclusion

through the provision of stable housing, suggesting that the DDA, in some modified form, is perhaps a welcome reinforcement of welfarism within the sector.

(2) Policy conflicts: social exclusion, housing and the mentally disordered

In May 2003 the government's Social Exclusion Unit ('the SEU') engaged in a major consultation exercise, which sought to establish reasons for, and solutions to, the particular exclusion experienced by people with mental health problems. Its final report, published in June 2004, emphasises the stigma and discrimination still experienced by the mentally disordered, and the difficulties they face in accessing basic services, often exacerbating their symptoms.[7]

Housing problems are highlighted as a fundamental issue in the report, part of 'getting the basics right', as 'decent and stable housing is critical to providing a sense of security'.[8] The document notes particularly that the mentally disordered are one and a half times more likely to live in rented accommodation, and so stresses the need to ensure that renters are helped to secure appropriate accommodation and supported in sustaining their tenancies. This is a problem faced particularly by social landlords. Social housing has developed as a 'safety-net' tenure, providing residual accommodation for many of the most vulnerable and marginalised in society.[9] The mentally disordered make up around nine per cent of applicants accepted by local housing authorities ('LHAs') in England under homelessness

legislation on grounds of priority need, a figure that has continued to rise since 1997. Of these, a high proportion experience what the SEU's report describes as 'severe and enduring' mental health problems, yet they are housed in mainstream accommodation following the closure of long-stay psychiatric hospitals and the development of care in the community policies. However, reductions in LHA stock as a consequence of the Right to Buy and Large Scale Voluntary Transfers means they are increasingly housed by Registered Social Landlords ('RSLs') and other voluntary organisations, which often operate specialist supported housing for this purpose.[10]

Whilst the SEU's report is a welcome development in policy towards mental disorder, it is a limited analysis in at least one important way. It is notable that the document makes no mention of the threat to the social inclusion of the mentally disordered posed by the government's anti-social behaviour strategy. The government has made clear that tackling 'anti-social behaviour' – low-level disorder affecting the quality of life of residents in their neighbourhoods – is one of its highest priorities.[11] It has adopted a highly punitive approach to the problem, exemplified perhaps by the ubiquitous anti-social behaviour order ('ASBO').[12] However, there has been little acknowledgement that a substantial proportion of the perpetrators of such conduct have mental health problems.[13] Certain conditions such as bipolar disorder, schizophrenia, severe depression and personality disorders, can manifest in behaviour that may appear threatening, or negatively affect the quality of life of neighbours.[14] As the mental health charity MIND noted during

the SEU's consultation process, the prevalence of psychiatric conditions among those targeted for their so-called anti-social behaviour could well lead to further stigmatisation of mental disorder, intensifying the social exclusion of this group.[15] Attention has been drawn particularly to the controversial use of ASBOs to control the symptoms of autism and Tourette's syndrome.[16]

These policies have serious implications too for the access of the mentally disordered to social housing, upon which they are so reliant. The government continues to present anti-social behaviour as a problem occurring predominantly around areas of social housing,[17] and as such social landlords are expected to take responsibility for its control. Under section 218A of the Housing Act 1996[18] they are now required to construct policies and procedures for its reduction,[19] further reinforcing Cowan's earlier claim that 'housing and its management has become a crucial part of the crime control industry; housing departments have become intermediators in the new criminal justice system'.[20] To that end, over the last decade housing providers have been granted a range of statutory powers enabling them to better control access to, and continued occupation of, their housing on behavioural grounds. The traditional nuisance grounds for eviction under the assured and secure tenancy regimes have been extended,[21] and new low-security tenancies developed. The introductory tenancy allows LHAs to evict a household easily during the first year,[22] extendable by a further six months.[23] Whilst the introductory tenancy is unavailable to housing associations, the Housing Corporation encourages Registered Social Landlords ('RSLs') to use what are colloquially termed

'probationary' tenancies: low-security assured shorthold tenancies again imposed for the first year of occupation. The more recent demotion regime enables all social landlords to reduce security to that of an introductory tenancy at any time.[24] Finally, allocation processes have been harnessed to achieve crime control objectives. LHAs are able to exclude housing applicants with a history of anti-social behaviour from their waiting lists for housing accommodation, or else give them lower priority on those lists,[25] whilst guidance on the operation of the homelessness legislation now specifically cites eviction as a result of anti-social behaviour as 'intentional homelessness', absolving LHAs from their duty to rehouse the applicant.[26]

MIND has voiced particular concern about the effect of these new housing management powers.[27] Whilst within the SEU's report the government might talk of supporting the mentally disordered in their tenancies, it suggests that the measures may instead encourage greater use of eviction by social landlords as a solution to complaints about their behaviour, exacerbating homelessness amongst a group already highly susceptible to this problem.[28] As Brooke LJ was prepared to concede in *Romano*, '[t]o remove someone from their home may be a traumatic thing to do in the case of many who are not mentally impaired. It may be even more traumatic for the mentally impaired.'[29] It is likely too that for mentally disordered individuals reliant on social housing, exclusion from allocation lists for past behaviour may leave them without adequate alternative housing options. It is this underlying tension between the promotion of stable accommodation for the mentally disordered,

and the increasing concern of social landlords with anti-social behaviour, that forms the basis of this article.

(3) Justifying exclusion from social housing: risk and responsibility

It is a common assertion that contemporary social housing policy and practice are dictated by a discourse of need.[30] This claim is supported by a glance at the legislative systems regulating allocation procedures, which grant priority status to a diminishing quantity of stock to certain categories of vulnerable individual. The mentally disordered are specifically protected in this way. Following criticism that 'care in the community policies' were developed without clear enough consideration of their implications for housing policy,[31] the Housing Act 1996 now provides that where an individual is vulnerable as a result of his disorder, he should be granted specific priority under both general allocation schemes and the homelessness legislation.[32] Housing commentators recognise, however, that the welfarist objectives underpinning the principle of need are increasingly threatened by the concern of advanced liberalism with the effective governance of 'risky' subjects. The progressive residualisation and marginalisation of social housing has brought within it a disproportionate concentration of such individuals. Its occupants are characterised consequently as a targeted population,[33] requiring intensive governance by housing providers and other agencies.[34] On the one hand, the often serious vulnerabilities suffered by many tenants, including mental

disorder, place them *at risk*, particularly from social exclusion. On the other, however, those same individuals may also pose risks to their housing providers and/or the wider community. Perhaps the most likely of these latter external risks is difficulty with the payment of rent, which may threaten the economic viability of a landlord. The focus of this article, however, is the problem of anti-social behaviour. The anti-social tenant is viewed within housing policy as a risk not only to the quality of life of individual residents, but the reputation of entire estates or neighbourhoods and the possibility that they will become, or remain, 'difficult-to-let'.[35]

Governmentality theorists have noted the various and subtle ways in which contemporary advanced liberalism; an often incoherent combination of neo-liberal, communitarian and neo-conservative ideology,[36] attempts to govern risky subjects by shaping them as self-regulating 'active citizens', capable of aligning themselves to constructed norms of behaviour.[37] For John Flint, social housing provision provides an important example of these developments. The welfare state is viewed increasingly as a moral hazard to those it serves; blamed for creating a dependency culture which reduces the individual responsibility of recipients. As such, occupants of social housing are encouraged by providers, through a range of what Foucault terms technologies of self, to engage as responsible tenants.[38] Tenants are persuaded first to behave as 'active consumers', capable of exercising choice in respect of the housing 'product'.[39] Second, they are reconstructed as 'moral members of

responsible communities' willing and able to refrain from anti-social behaviour.[40]

The ultimate technology employed by providers to shape this latter responsible moral agency is conditionality of housing provision: an individual's entitlement to occupation within the sector is increasingly dependent upon satisfying certain conditions of behaviour.[41] Whilst technologies of self such as conditionality may well succeed in changing behaviour, the concern of this paper is the anti-social tenant who fails to align his conduct as required. For this individual, technologies of the self are likely to give way to increasingly disciplinary forms of control. The severest of these technologies, of course, is exclusion from the sector altogether, as conditionality is enforced. One can see then the tension within advanced liberal housing policy between the principles of need and conditionality. Two justifications, however, are deployed to support exclusion from social housing in such circumstances.

First, a landlord may consider itself unable to underwrite the risk posed by an anti-social individual who proves resistant to technologies of self. Risky individuals are increasingly difficult to accommodate within social housing, given the pressures of managerialism on the sector.[42] Exclusion from social housing is viewed as a way to manage that risk, by physically removing recalcitrant perpetrators from a particular housing environment. Providers increasingly govern access to the sector through assessments of risk as well as need,[43] with the legal infrastructure governing access to the sector modified accordingly. Risk assessments are employed within allocation decision-

making, enabling exclusion of individuals on application.[44] Introductory tenancies extend the operation of these processes by providing a further opportunity to assess risk *in situ*, whilst retaining the power to evict an occupant easily if that risk materialises. Thereafter, exclusion is still possible under the secure and assured tenancies, though considerably more difficult because the requirement of reasonableness enables a court to balance the effect of eviction on vulnerable households.[45] Yet even here the discourse of risk has taken precedence over need. Whilst the effect of nuisance behaviour on other residents must always be taken into account,[46] a statutory structure to the courts' discretion incorporated by the Anti-social Behaviour Act 2003 now demands that primary consideration should be given to the effect of the offending conduct on others if it were to continue.[47]

Second, exclusion is further justified by ascribing personal responsibility and blame to the tenant for his failure to take responsibility for his actions. Anti-social behaviour is treated within government discourse as the product of a moral deficit on the part of the individual perpetrator; its cause simply a problem of disrespect.[48] As the government elaborates in its White Paper *Respect and Responsibility*:

> '[t]he common element in all anti-social behaviour is that it represents a lack of respect or consideration for other people. It shows a selfish inability or unwillingness to recognise when one's individual

behaviour is offensive to others, and a refusal to take responsibility for it.'[49]

Haworth and Manzi suggest that this individualistic, moralistic approach to the cause of anti-social behaviour permeates the discourses of housing management.[50] Anti-social tenants alone are to blame for their failure to satisfy the conditions of their occupation. They are capable, but unwilling, to take responsibility for their conduct. As such, the excluded perpetrator no longer deserves to be a social tenant, whilst exclusion allows limited housing resources to be re-allocated to other, more 'deserving', applicants.

A key consequence of this construction of the 'irresponsible' anti-social individual is a refusal to absolve perpetrators from blame for their conduct on grounds of their own difficult circumstances. As the government emphasises:

> 'Family problems, poor educational attainment, unemployment, and alcohol and drug misuse can all contribute to anti-social behaviour. But none of these problems can be used as an excuse for ruining other people's lives. Fundamentally, anti-social behaviour is caused by a lack of respect for other people.'[51]

One finds then rejection by government of structural explanations of anti-social behaviour as the product of socio-economic deprivation.[52] Instead, there is an emphasis, highlighting the influence of neo-conservatism upon the

government's communitarian agenda, of the need 'to reintroduce the notion of blame, and sharply reduce our readiness to call people 'victims''.[53] Individuals are culpable irrespective of these mitigating factors, because ultimately they can still choose to behave appropriately. Housing providers, once again, appear to have drawn directly from these assumptions; for Brown, 'the discourse [within the sector] is one of 'common sense' morality rather than pathology'.[54]

(4) Problematizing mental disorder: the medical model

Advanced liberalism, as applied through social housing policy, justifies exclusion of anti-social tenants on grounds of their failure as responsible moral agents. Not only is it necessary in certain circumstances to manage the risk they pose to others, but given that that failure is simply a problem of irresponsibility, those excluded are blameworthy and so undeserving of further welfare provision. This section, however, problematizes these justifications through their application to the paradigm of the mentally disordered tenant. 'Mentally disordered', for the purpose of this paper, refers simply to any person diagnosed with a psychiatric condition by a clinician. Through the process of medical classification, an individual is drawn within what sociologists term the 'medical model';[55] a tool employed to explain a range of deviant behaviour. Robert Veatch suggests that a particular deviancy will be classified under the medical model 'if it is judged (a) involuntary and (b) organic, if (c) the class of

relevant, technically competent experts is physicians, and if (d) it falls below some socially defined minimal standard of acceptability'.[56] These assumed characteristics of the mentally disordered have two important implications for the rationalities of risk and responsibility that guide governance of anti-social tenants through exclusion.

(a) Medico-welfare professionals as experts

Foucault contends that knowledge is essential to the exercise of power through governance.[57] Housing professionals undoubtedly have claim to sole expertise in many areas of housing management. Diagnosis of a mental disorder, however, establishes competing sources of knowledge/power which providers must negotiate. Under the medical model, as noted by Veatch, health professionals are identified as 'technically competent experts', with the training necessary to both classify and treat an individual's psychiatric condition. I would argue that diagnosis also draws welfare professionals such as social workers within this category, given their various duties to support those vulnerable as a result of their disorders.[58] There is clearly potential for conflict between the approaches of medico-welfare and housing professionals to the governance of the mentally disordered. The sole concern of medico-welfare professionals is the risk that a mentally disordered subject poses to himself. As such, they will inevitably seek to ensure that they are maintained within the social rented sector irrespective of the risk their conduct poses to

others.[59] The disruption associated with homelessness through lack of other feasible housing options, or the instability of private renting, has been shown to exacerbate psychiatric conditions.[60] Indeed, as Cowan argues, maintaining the mentally disordered within the social rented sector following deinstitutionalisation was itself a form of risk management. They were identified as having priority need for social housing, because without settled accommodation they were thought to pose a risk to themselves.[61]

Possession proceedings, as we shall see, are often the setting for conflicts of knowledge and expertise between housing providers and medico-welfare professionals. However, where there exists the possibility of conflict one finds too the opportunity for productive co-operation. Efforts have been made by the government to encourage greater inter-agency partnership between welfare agencies. Such joined-up thinking reflects an epistemological move towards the sharing of knowledge of a particular subject between agencies,[62] enabling the incorporation of medico-welfare expertise into a landlords' approach to risk management.[63] This can have beneficial consequences. Supporting the mentally disordered in their tenancies, rather than excluding them, may well prove a superior risk management strategy for housing providers expected, unlike medico-welfare professionals, to protect residents of their housing from anti-social behaviour. It is generally accepted that rather than controlling risk, exclusion simply transposes it elsewhere; often into the private rented sector where the possibility for governance is weakened considerably.[64] In some cases the same communities may face that risk again

as the perpetrator is re-housed in the locality. Moreover, if exclusion exacerbates the disorder, an individual poses a greater risk not only to himself, but to others as well. This suggests the need for a move away from punitive responses to anti-social behaviour towards holistic, preventative solutions. There is an emphasis particularly upon early intervention to prevent tenancy breakdown. Negotiation between agencies can lead to the cessation of legal proceedings, as other non-legal solutions are identified.[65]

For many housing providers, partnership working of this kind is already intrinsic to their operations. Specialist supported housing organisations in particular draw together the provision of housing with treatment and support services. [66] General housing providers too are increasingly establishing protocols to ensure that resort to legal sanctions is preceded by an assessment of the mental health of the individual, the bearing this may have on his behaviour and the possibility of support or treatment of a diagnosed condition.[67] These holistic approaches can only improve under the government's *Supporting People* programme. However, inter-agency cooperation is not always what it should be.[68] Housing managers, most likely general providers, who fail to engage with other agencies may have no knowledge of a tenant's condition until a late stage in legal proceedings. Of course, housing providers are not always the problem. Evidence suggests that social services often fail to respond to the requests for assistance from landlords, with possession proceedings sometimes initiated in an effort to attract the attention of uncooperative agencies.[69]

(b) The mentally disordered as non-responsible agents

Exclusion of the anti-social from social housing is justified by the assumption that an individual is solely responsible for his failure to satisfy the conditions of his occupation, and as such is appropriately blamed for his failure to satisfy the conditions of his occupation. Structural explanations of conduct are abandoned in favour of those emphasising individual moral deficit. Commentators continue to argue, however, that these structural problems should indeed mitigate responsibility for bad behaviour. It is unfair to place fault solely upon the shoulders of the individual, when externalities for which they are not responsible impinge upon their capacity to behave appropriately. This appears to be the implication behind Pauline Papps' suggestion that it is inappropriate for the government to disregard 'wider issues and problems faced by the perpetrators, *which are often beyond their control*'.[70] Criticism of this kind resonates particularly with the attitudes of many towards mental disorder. Psychiatric conditions are even more difficult to disassociate from anti-social behaviour than socio-economic circumstance because of the impact they are presumed to have upon an individual's capacity for control his actions. The paradigm of the mentally disordered tenant illustrates the danger of mislabelling inherent in a concept as nebulous as anti-social behaviour. The government's explanation of all such conduct as a matter of disrespect is obviously inadequate when applied to the mentally disordered, highlighting the

way in which such political sloganeering has the potential, as MIND argues, to stigmatise the mentally disordered through their elision with the archetype of the anti-social 'yob'.[71]

The medical model takes a particular approach to the responsibility of the mentally disordered. As Veatch suggests, it assumes that the actions of those diagnosed with a psychiatric condition are entirely non-voluntary. It treats all anti-social conduct of the mentally disordered as the symptom of illness - the product of a chemical or biological imbalance in the brain - and, as such, a problem of pathology rather than morality. Blame and stigma are inappropriate reactions to such behaviour because the underlying condition is both imposed upon the individual and entirely out of his control. The medical model promotes then absolute exculpation of an individual of responsibility for his actions:

> 'A sinner or criminal or morally irresponsible person would be seen as deficient in character to the extent that he has brought on his condition; the person in the sick role is not. More significantly, one in the sick role is not expected to use willpower or self-control to overcome his condition'.[72]

The mentally disordered are incapable of exercising, rather than unwilling to exercise, responsible moral agency. Rather than morally irresponsible, they are characterised as *non-responsible*. This assumption of non-responsibility poses serious problems for the operation of conditionality in social housing provision. As we have seen, exclusion from social housing is justified by

constructing the anti-social tenant as personally blameworthy for his failure to take responsibility for his actions. Under the medical model, however, the mentally disordered individual is blameless, and as such should not be subjected to the demands of conditionality.

The assumption of non-responsibility, however, is itself highly problematic. Few believe that the anti-social symptoms of those classified as mentally disordered are always, as Papps puts it, beyond an individual's control, and that it is always unreasonable to expect them to take responsibility for their behaviour. The extent to which actions caused by a mental disorder should be treated as non-voluntary continues to tax theorists of action, [73] going to the heart of the unresolved debate between proponents of free will and determinism.[74] The thesis of non-responsibility under the medical model is an example of hard determinism. However, Western philosophy, which tends to presume capacity for free will, demands much more than psychiatric classification to excuse an individual from responsibility for his actions. The moral philosopher Joel Feinberg, for instance, recognises the medical model's tendency to reject ascription of blame. A psychiatrist 'might hold it self-evident that sick people are not to be treated as responsible people; hence the criteria of illness are themselves criteria of non-responsibility'.[75] He concludes, however, that this is undoubtedly a mistaken assumption: two additional criteria are required. It is necessary first to establish that the mental disorder is a "but for" cause of particular offending conduct. Second, in line with the Aristotelian approach to responsibility assumed in the West, philosophers of

action argue that to be entirely non-responsible a particular mental disorder must render an individual either incapable of controlling his behaviour, or else unable to rationalise what he is doing.[76]

For Feinberg, 'not all neurotic and psychotic disorders, by any means, produce compulsive or delusionary symptoms'.[77] Indeed, challenges to the medical model's assumption of non-responsibility have also been made from a psychiatric perspective. Pamela Bjorklund, for instance, claims that in practice very few of those diagnosed with a psychiatric condition are ever entirely non-responsible, continuing that '[i]n fact, their agency and responsibility admit degrees; and in any given instance of moral adjudication, the degrees, limits and boundaries of their (moral) responsibility are continuously negotiated and renegotiated'.[78] This is a particularly interesting comment. It emphasises that, where a mental disorder does not fully exculpate, the moral expectations demanded of the mentally disordered are not absolute. Instead, the process of moral adjudication is constantly contested, with the outcome dependent upon the adjudicator, the particular subject, and all the circumstances within which the judgement is made. It is contended that two sources of knowledge tend to be drawn upon to assess the moral responsibility of an individual for his anti-social conduct. On the one hand, an adjudicator will consider the degree to which he believes an individual is capable of exercising direct control over particular behaviour. On the other, he will often assess the individual according to his 'meta-responsibility'. Edward Mitchell employs this term to explain the ascription of blame not for anti-social conduct itself, but for steps taken by the

individual to bring about or exacerbate the condition that causes that conduct.[79] For example, an individual may engage in substance abuse, termed 'dual diagnosis', which may increase the anti-social symptoms of a psychiatric condition. He may also fail to engage with support or treatment programs offered to him.

Of course, it is impossible to identify with any precision the extent to which a particular individual's conduct is caused by the disorder, or the extent to which he should be expected to control his anti-social conduct or contribute to the management of his condition to prevent it occurring. Neither neurologists nor psychiatrists have a 'magic lantern to light up the concealed corners of a defendant's mind',[80] dependent instead upon assessment of external manifestations of the condition. In terms of compulsion, for instance, Glanville Williams highlights the epistemological difficulty that:

> 'the step between "he did not resist his impulse" and "he could not resist his impulse" is incapable of scientific proof. A fortiori there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses'.[81]

It is for this reason that moral adjudication of the mentally disordered is constantly contested. One thing, however, is clear: any such adjudication cannot be based upon the expertise of a housing provider alone. The simplistic moralism of housing management discourse is wholly inadequate. Only

through negotiation with medico-welfare professionals, who are inevitably better placed to assess an individual's capacity for moral responsibility in light of their disorder, can a provider hope to engage in a meaningful assessment of moral blame. The exchange of knowledge through partnership is a necessary basis for meaningful governance of the mentally disordered subject through conditionality.

As an illustration of the conflict between medical and moral models of responsibility, I want to look finally at the controversial status of the personality disorder. Anti-social behaviour may well be classified by clinicians as the product of a personality disorder. Note, for example, the symptoms of dissocial personality disorder, defined by the *International Statistical Classification of Diseases and Related Health Problems* ('the ICD') as follows:

> 'Personality disorder characterized by disregard for social obligations, and callous unconcern for the feelings of others. There is gross disparity between behaviour and the prevailing social norms. Behaviour is not readily modifiable by adverse experience, including punishment. There is a low tolerance to frustration and a low threshold for discharge of aggression, including violence; there is a tendency to blame others, or to offer plausible rationalizations for the behaviour bringing the patient into conflict with society.'[82]

However, whilst personality disorders are formally recognised as psychiatric conditions by the ICD, considerable debate remains, even amongst members of the medical community, as to whether they actually constitute medical conditions at all. Famously, Thomas Szasz has questioned the very existence of mental illness. He argues that it represents a social construct rather than a disease, employed by doctors to explain any deviance from behavioural norms in medical terms.[83] Whilst in light of recent scientific developments many would dispute Szasz's analysis in relation to more established psychiatric conditions such as schizophrenia, it appears to hold continued relevance with respect to personality disorder. Commentators have argued that the psychiatric status of personality disorders is a form of professional imperialism over what are in fact simply extreme character traits,[84] and continue to debate whether they are in fact susceptible to medical treatment.[85]

The problem is compounded by the fact that diagnosis of a personality disorder is a highly inexact science, justified simply on identification of behavioural symptoms by a psychiatrist. Indeed, a number of high profile medical professionals, concerned by the government's proposals to enable the forcible detention of those diagnosed with severe personality disorders, have suggested recently in the *British Medical Journal* that 'levels of agreement between clinicians about who should be classified in this way are often no better than chance'.[86] Characteristics that might constitute a personality disorder under a psychiatric assessment are capable of classification under a moral model as merely a problem of self-discipline. There exists then a blurred

line between psychiatric condition and moral deficit, with classification, and the consequences of that classification, dictated unpredictably by the model, medical or moral, applied in a particular context.

One common concern arising from this debate is that classification of personality disorders impinges upon the responsibility of such individuals for their conduct. Bjorklund argues that unlike other mentally disordered individuals, those with personality disorders suffer from absolutely no impairment of either their volition or cognition,[87] and as such are fully responsible for their behaviour. It is questionable then whether classification of a personality disorder should act as a mitigating, let alone exculpatory, characteristic. Suspicion of categorising personality disorders as medical conditions rather than moral characteristics, with the implications this has for the ascription of blame, is evident in the words of one medical commentator:

> '[b]oth the psychodynamic and biological accounts of personality disorder, if indiscriminately applied, appear to diminish personal responsibility. If personality disorder justifies mitigation in the forensic setting, then large numbers of people in society are walking about with a trump card, to be played should they ever go to court'.[88]

(c) The medical model in the legal arena

We will return to the capacity of the mentally disordered for responsible moral agency later when evaluating the criticisms levelled at the operation of the DDA. For now, however, it is perhaps useful to illuminate the previous discussion through an examination of the approach to mental disorder with legal proceedings. In *Croydon Borough Council v Moody*,[89] the defendant was a local authority tenant of 61 years of age, whose erratic and alarming behaviour had led to the bringing of possession proceedings by his landlord. The trial judge heard evidence from a professional psychiatrist that the defendant suffered from a combination of an obsessive personality disorder and dementia. The evidence also suggested that the conduct could be successfully treated, and as such it was argued that eviction would be unreasonable. The trial judge, however, refused to acknowledge that the defendant had a mental health problem at all, and held that a possession order should be granted. The judge added:

> 'Whether the behaviour is deliberate - I have no reason to doubt that it is deliberate - and the intention behind the behaviour - the intention in my judgment is to get his own way in respect of anything which concerns him and the opinions and feelings of other people are irrelevant … The medical evidence does not persuade me any way that the defendant does not know precisely how his actions affect other people. He may well have a personality disorder and it may well be treatable. Applying a certain degree of robustness it might well be said that a little of self-discipline,

coupled with a good deal of consideration for other people's feelings, would be appropriate. But I strongly feel that that is an impossible outcome to this case.'[90]

The decision was ultimately overturned by the Court of Appeal, which was noticeably surprised by the judge's interpretation of the medical evidence. It concluded that the medical evidence was in fact entirely acceptable, and as such the possibility of treatment for the disorder was a relevant consideration that should have been taken into account.

A number of points can be drawn from this decision. It illustrates, first, the conflicts of knowledge and power that can arise between the competing approaches of medico-welfare professionals and housing providers to the management of the risky subject. On the one hand, the plaintiff landlord wishes to exclude to manage the risk. On the other, the health professional advocates treatment and warns of the consequences of eviction on the condition. The court emerges here as the final arbiter between these concerns. Second, the refusal of the trial judge to acknowledge the expert evidence reflects clearly a suspicion of psychiatric classification of personality disorder. Third, the judge assumed – in line with the moral rather than medical model of responsibility - that even if the defendant was suffering from such a disorder, it was not necessarily the case that he was unable to exercise responsible moral agency. Indeed, under the judge's moral adjudication the defendant alone was to blame for his conduct. Notably, when engaging in his own moral adjudication of the

defendant's behaviour the judge talks explicitly in the terms of the philosophy of action; emphasising the presence to his mind of both cognition (knowing how his actions affect others) and volition (the capacity to exercise self-discipline). His failure of responsible moral agency was therefore culpable, and as such the enforcement of conditionality through exclusion was justified.

(5) The impact of the DDA on the control of anti-social behaviour through housing management: the ramifications of *Romano*

It is against the problematic construction of the risky and irresponsible tenant that I want to assess the impact of the Disability Discrimination Act 1995 on the control of anti-social behaviour by social landlords. The DDA was designed to tackle discrimination against disabled people by imposing duties on individuals and organisations in three key areas: employment, education and access to goods and services. The latter category extends to housing. Sections 22 to 24 prohibit three broad forms of housing-related discrimination. First, a person with the power to dispose of premises is prohibited from discriminating against a disabled person in the terms on which he offers to dispose of those premises; by refusing to dispose of those premises; or in the way he allocates those premises.[91] Second, it is also unlawful for a person managing any premises to discriminate against a disabled person occupying those premises (whether a tenant or a member of the tenant's household) in the way he permits him to make use of any benefits or facilities, by refusing or

deliberately omitting to permit him to make use of any benefits or facilities comprised in a lease; or by evicting him, or subjecting him to any other detriment.[92] Finally, a person whose licence or consent is required for the disposal of premises must not discriminate against a disabled person by withholding that licence or consent.[93]

Notably, the DDA protects only those individuals whose 'mental impairment' has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.[94] It focuses specifically then upon conditions that place them at particular risk of social exclusion, representing an important first step in the promotion of the SEU's objectives. Sections 22 to 24, in particular, mirror the emphasis placed by the SEU upon access of the mentally disordered to housing. Problematically, however, the definition of mental impairment includes the types of mental disorder, discussed above, which can give rise to the kind of challenging behaviour that might form the basis of complaints to housing managers by other residents. It was not until March 2003, eight years after the passing of the legislation, that the impact of the DDA on the capacity of a social landlord to control such behaviour became apparent. Both the initial High Court decision in *North Devon Homes v Brazier*[95] and the subsequent Court of Appeal judgment of Lord Justice Brooke in *Manchester City Council v Romano*[96] focused upon the effect of the DDA on the power of a social landlord to evict a mentally disordered occupier from a secure or assured tenancy on grounds of their nuisance behaviour. The litigation came as a considerable shock to social landlords, who had apparently

failed to appreciate the impact of the DDA upon housing management before this point. As Brooke LJ explained in the *Romano* case, the Court of Appeal were 'told by very experienced leading counsel that it was the publicity given to [the *Brazier*] judgment in March 2003 which attracted general attention for the first time to the possible need for a court to take the 1995 Act into account when assessing the reasonableness of making a possession order'. [97]

The decisions confirm the following. Under the Housing Acts 1985 and 1988, governing the right to possession of a secure and assured tenancy respectively, a court must satisfy itself that it is reasonable to evict an occupier for anti-social behaviour. However, if it is found that the eviction is discriminatory under the DDA, and is unjustified, it will be inherently unreasonable for a county court to grant a possession order. A landlord discriminates against a disabled person under the DDA if 'for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does or would not apply'.[98] The seminal decision of the Court of Appeal in *Clark v Novacold*[99] ensures an extremely broad interpretation of this definition. First, the reason for particular treatment need not be motivated by simple hostility towards a disability *per se*, but by any characteristic with a causal connection to that disability. It extends, as such, to the control of anti-social behaviour arising from a mental impairment, even if a landlord is unaware of the underlying condition. Second, the theoretical comparator test employed to identify whether the treatment is less favourable is unlike the tests under the race and sex discrimination

legislation. These demand that the effect of treatment on a person with a particular status should be compared with that of a person without that status in otherwise broadly similar circumstances. The comparator under the DDA, on the other hand, is someone, whether disabled or not, without the related characteristic giving rise to the treatment. As such, the perpetrator of anti-social behaviour should be compared with an individual who does not act in that way, rather than a non-disabled individual who behaves in that manner. It is irrelevant that a landlord would have reacted in the same way to anti-social behaviour that was not the result of a mental impairment.

The upshot of this approach then is that any prohibited act by a social landlord in response to conduct related to a relevant mental impairment (in this case, the bringing of possession proceedings), whether or not it is aware of that impairment, will always amount to *prima facie* discrimination. However, the DDA does not preclude the landlord from regaining possession of a property in such circumstances. The statute sets out instead a 'fixed list' of justifications that can legitimise discriminatory treatment. The only relevant justification in the context of anti-social behaviour is that the occupier poses a danger to others.[100] The justification has two parts. The landlord must be of the opinion when it decides to regain possession of the property that eviction is necessary to prevent the endangerment of another's health or safety. The court must then satisfy itself that it was reasonable, given all the circumstances of the case, for the landlord to hold that opinion. As the Court of Appeal noted, given the breadth of the definition of less favourable treatment, satisfying this justification

is absolutely key to a social landlord wishing to avoid discriminating against a tenant.[101] The DDA has consequences not only for the eviction of secure and assured tenants, but all attempts to exclude an individual from social housing. It will be discriminatory for a social landlord to evict from an introductory, 'probationary' or demoted tenancy in response to behaviour caused by a mental impairment. The DDA also explicitly prohibits discriminatory allocation procedures. An outright refusal by a social landlord to allocate premises will be *prima facie* unlawful, whether under general waiting lists or, in the case of LHAs, under homelessness allocations. So too will the decision to place an individual at a lower point on their lists.

Although this paper focuses upon the impact of the DDA upon exclusion from social housing, it should be noted that the legislation also extends to other technologies for the governance of perpetrators. A social landlord may be precluded from reducing the security of recalcitrant occupiers. Section 22(3)(c) states, in full, that '[i]t is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises by evicting the disabled person, *or subjecting him to any other detriment*.' 'Detriment' is an expansive term, extending to treatment of such a kind that the individual affected 'would or might take the view that in all the circumstances it was to his detriment'.[102] Whilst introductory or probationary tenancies apply to all new tenants and are therefore inherently indiscriminate, the extension of the tenancy by a further six months, with the further loss of security this entails, would clearly be viewed by an LHA occupier as detrimental. This should also

be the case with demotion. Housing managers also have recourse to powers ancillary to their management of housing: the statutory housing injunctions[103] and the ASBO.[104] As the Court of Appeal suggests, unless justified it may well be illegal under the DDA for a landlord to seek sanction for breach of either tool.[105]

(6) The call for reform

The DDA has been criticised from its inception for failing to effectively protect the disabled. Commentators argue in particular that it is under-inclusive in its definition of disability[106] and that the justificatory provisions legitimate too many discriminatory practices.[107] As the product of political expedient, it is said to represent 'at best, half measures and reluctant reform';[108] a critique that extends to the provisions on access to premises, with the accusation that sections 22 to 24 are 'both too narrow and too weak'.[109] However, following *Romano* the DDA has, for the first time, become the subject of criticism for appearing to impinge disproportionately in practice upon the interests of the non-disabled. Brooke LJ expressed concern that as 'policy-driven modern legislation which has not been subjected to rigorous scrutiny',[110] it could lead to 'absurd and unfair consequences' for those subject to its provisions, concluding that 'Parliament ought to review [the] legislation at an early date'.[111] Sections 22 to 24, notably, were added to an already hasty bill almost as an afterthought at a late stage in its progress through Parliament.[112] It is likely

then that the problems they might pose for the control of behaviour caused by mental disorder were left unconsidered. The Court of Appeal was therefore right to suggest that the government would be well-advised to examine closely the ramifications of the legislation for the range of providers it affects.

An exhaustive discussion of the possible negative ramifications of the DDA, or even those provisions relating specifically to premises, is beyond the scope of this article.[113] It can be noted briefly, however, that social landlords face a variety of problems beyond the control of anti-social behaviour, leading one commentator to conclude that the DDA now 'presents a major encroachment on management of housing stock'.[114] The Court of Appeal, for instance, raised the possibility that a landlord will be precluded by the legislation from evicting an individual for rent arrears if his inability to pay is related to a mental impairment, in the absence of any economic justification for less favourable treatment.[115] Barr and Glover-Thomas also suggest that the DDA undermines the effective management of short- to medium-term supported housing for the mentally vulnerable,[116] by preventing the operational flexibility required to run such projects. One of their concerns is the effective control of anti-social behaviour within these institutions. They are equally worried, however, that a housing manager will be unable to evict an occupier as part of his support or treatment, either in order to rehouse him in more suitable accommodation, or because he is no longer in need of the services, 'even though it would be intended (and may be necessary) to further both the

objects of the charity and the objective best interests of the housed individual'.[117]

Returning to the specific impact of the DDA on the control of anti-social behaviour, however, it is contended that, superficially at least, the legislation may actually improve upon social landlords' current governance of the anti-social by encouraging greater co-operation between housing and medico-welfare professionals. First, as we have seen, even if a housing provider is unaware that a perpetrator of anti-social behaviour has a mental impairment,[118] or that his behaviour is caused by that impairment, it may still discriminate against him under the DDA by taking steps to control his conduct. To ensure compliance with the legislation a social landlord would be well-advised to identify whether or not the perpetrator has a causal mental impairment when deciding how to respond to a particular case of anti-social behaviour. This may encourage providers otherwise reluctant to engage with the knowledge and expertise of medico-welfare professionals, and perhaps increase preventative use of support and treatment rather than exclusion. As the Court of Appeal conceded:

> 'This judgment shows that landlords whose tenants hold secure or assured tenancies must consider the position carefully before they decide to serve a notice seeking possession or to embark on possession proceedings against a tenant who is or might be mentally impaired. This is likely to compel a local housing authority to liaise more closely with the

local social services authority at an earlier stage of their consideration of a problem that might lead to an eviction than appears to be the case with many authorities, to judge from some of the papers the DRC [Disability Rights Commission] placed before the court.'[119]

The DDA may also encourage the exclusion of the mentally disordered from social housing is legitimated only as a very last resort. Under the legislation a housing manager must hold a reasonable opinion that the treatment is 'necessary' to prevent an established risk to health or safety. It is contended that this could provide an opportunity for a defendant to argue that a landlord has failed to take adequate steps to assess the benefits of alternative measures that might be employed to manage the risk an individual poses. As Brooke LJ states in *Romano*, a social landlord 'must prove that if it did not take *this action* someone's health or safety would be endangered'.[120] The role of alternative remedies is particularly important when a social landlord decides to bring possession proceedings. Under the reasonableness requirement for possession of an assured or secure tenancy, the suitability of alternatives to eviction is currently an irrelevant consideration,[121] yet landlords have available to them a range of other housing management tools; in particular injunctions and ASBOs, that do not threaten a mentally disordered occupant with homelessness. It may well be the case that support or treatment of the condition is a more appropriate solution to the problem. It should be remembered, of course, that the 'health or safety' justification requires only that

a landlord has a reasonable opinion that less favourable treatment is necessary. A court must therefore simply gauge whether the decision falls within the range of reasonable opinions that the landlord could have reached. This standard makes it far less likely that a court will challenge the choice of response than if it were empowered to reach its own conclusion on the matter. However, the requirement may still have an important procedural role to play. It has been held that an opinion is reasonable only if formed following 'sufficient inquiry' into the circumstances of the case.[122] As such, a landlord should be expected at the very least to provide documentary evidence that it has considered alternative responses to the complaints levelled at an occupier.

Irrespective of the potential procedural benefits of DDA, however, the *Romano* decision has been greeted predominantly with consternation because of the substantive restrictions it imposes upon the governance of anti-social behaviour by social landlords. The following sections explore these criticisms, contending that they reflect the conflict that exists between the ostensibly welfarist objectives of social housing provision and the competing advanced liberal discourses of risk and responsibility.

(a) Conflicting systems of risk

Unlike other characteristics such as race or sex warranting protection under anti-discrimination legislation, the framers of the DDA recognised that the disabled, given their physical or mental weaknesses, may in certain

circumstances represent a risk to others. This was the reason for the existence of the 'health or safety' justification. Problematically, however, the concepts of 'health' and 'safety' employed by the legislation limit social landlords to the management of a particular spectrum of risk. Drawn as it is from the lexicon of the workplace,[123] it is terminology normally associated with accidents arising from the hazards of the industrial environment; with unexpected physical illness and injury. This was indeed the immediate conclusion of David Steele J in the *Brazier* case, the precursor to *Romano*, who assumed that eviction would be unlawful under the DDA because the behaviour of the defendant did not constitute 'an actual physical risk' to other residents.[124] Anti-social behaviour policies, on the other hand, are concerned with a far broader array of risks which do not necessarily impact directly upon an individual's physical integrity, ranging from untidy gardens to noise pollution. This reflects to an extent the government's acceptance of Wilson and Kelling's influential 'broken windows' thesis, which argues that low-level disorder, if left uncontrolled, can lead to the degeneration of communities.[125]

Protection from these low-level risks is also increasingly recognised as a human right. Residents of social housing affected by anti-social behaviour, whether caused by a mental disorder or not, are likely to have had their Article 8 rights infringed.[126] Strasbourg jurisprudence attests that a person's private life extends to both physical and psychological integrity.[127] Even low-level disorder such as noise might fall within the ambit of Article 8 if it were to 'affect individuals' well-being and prevent them from enjoying their homes in such a

way as to affect their private and family life adversely, without, however, seriously endangering their health'.[128] Local housing authorities, as public authorities, have a particular duty to actively protect and promote the Article 8 rights of citizens, including prevention of interference by others with the quality of their home life.[129] Moreover, legislators are expected to ensure that statutes such as the DDA do not impact disproportionately upon those rights.[130] However, because less favourable treatment can only be justified when the health or safety of a person is endangered, the DDA precludes a landlord from taking action where no such threat exists.

It is perhaps unsurprising, given the political salience of anti-social behaviour, that the Court of Appeal's response to this conflict of legislative risk systems was a bout of judicial activism that has effectively neutralised sections 22 to 24. Ignoring David Steele J's purposive interpretation of the justification in *Brazier*, Lord Justice Brooke decided to draw instead upon the definition of the World Health Organisation, that health constitutes 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.[131] It is contended that the inclusion of social, as well as physical and mental well-being, within the definition of health has broadened the concept to include all forms of anti-social behaviour that might form the subject of legal action. Any conduct that negatively affects his own subjective assessment of his quality of life in and around his home will endanger an individual's well-being, whether or not it has any lasting effect on his bodily or psychological integrity. Even after adopting the WHO definition, Brooke LJ was

still convinced that the justification would not extend to all the risks a landlord might expect to manage under the rubric of anti-social behaviour, suggesting that behaviour that did not threaten health or safety, but caused house prices to decrease, could not be dealt with, even by an injunction.[132] However, his Lordship's concern seems unfounded, given that it must doubtless be the case that social well-being will always be threatened by a decrease in the general amenity of a neighbourhood serious enough to affect the housing market.

Interestingly, application of the WHO definition of health has been employed as an interpretative technique before. When the British government attempted to attack the legality of the EC Working Time Directive on grounds that it did not fit within the head of 'health or safety' legislation, the European Court used it to expand the power of the EC to extend its control over areas of social policy.[133] However, it may not be so simple to neutralise another piece of welfarist legislation that has created similar conflicts with the broader risk management associated with anti-social behaviour. The Children Act 1989 imposes a duty on a local authority to safeguard and promote the welfare of a child in its care, unless it is 'necessary, for the purpose of protecting members of the public from serious injury'.[134] In a recent High Court decision, it has been suggested that a council may well be precluded from imposing an ASBO when the risk to others falls below this level.[135] The risk system focuses solely upon physical integrity, and it is unlikely that the higher courts will be able to find a way to bring the legislation into line with the lower risk threshold demanded by anti-social behaviour policies.

(b) Patronising the mentally disordered?

The Court of Appeal acted then to ensure that housing providers are able to protect residents and their communities from the full spectrum of risks associated with anti-social behaviour. This, however, is not the only criticism levelled at the DDA. A rather different, and far more interesting, concern is to be found in the reaction of Andrew Arden QC, counsel for Manchester City Council in the *Romano* decision, in a subsequent editorial on the case. Clearly assuming that the WHO definition of health still precluded landlords from taking action in certain circumstances to protect residents from low-level anti-social behaviour, he described the DDA as granting the mentally disordered:

> '[a] somewhat peculiar (and, perhaps, patronising) entitlement to make others' lives uncomfortable if not downright miserable … [which] provokes the very sort of hostility the Act is intended to avoid, and denies the disabled the very acceptance that the Act is intended to secure'.[136]

It is contended that this passing comment reflects the broader debates which, as we have seen, surround adjudication of the capacity of the mentally disordered for responsible moral agency.

Under a moral model an individual is not absolved from responsibility for his behaviour simply because he has been diagnosed with a mental disorder.

For him to be exculpated it is necessary to show instead both a causal link between the disorder and particular anti-social conduct, and the breakdown of an individual's power of cognition or volition. Where causal conduct is neither the product of compulsion nor delusion, which appears to be mostly the case, a particular moral adjudicator may construct the presence, or otherwise, of moral responsibility for his actions. The DDA, however, rejects this moral model. It provides that where no risk to health or safety exists, any conduct 'related' to a relevant mental impairment cannot form the basis of less favourable treatment by a housing provider. The upshot is that a landlord in such circumstances will be precluded from excluding an individual, even when he might be judged on a particular moral adjudication as responsible for the behaviour that forms the complaint against him. The extent to which he might be capable of controlling his disorder, and/or his 'meta-responsibility' for creating or exacerbating that condition, will be irrelevant.[137]

Returning once again to the particular example of the personality disorder, we can see clearly the consequences of the DDA for moral adjudication. Personality disorder is recognised by the legislation as a mental impairment. The ISD constitutes an appropriate source for this purpose,[138] which explicitly recognises the condition. Diagnosis of a personality disorder will result in this assumption of non-responsibility under the DDA, even though conduct is arguably an anti-social character trait, for which an individual should always be held responsible. Moreover, the application of the DDA rests upon what we have seen is an extremely unpredictable psychiatric classification.

Currently, 'the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion'.[139] As such, the protection afforded to individuals under the legislation is likely to be uneven and subject to inevitable controversy. Indeed, the problem may increase under the Disability Discrimination Act 2005, which will soon remove the requirement that a disorder must be 'clinically well-recognised'.[140] Identification of a mental impairment will then no longer need to be substantiated by a respected body of medical professionals, increasing the possibility of a court accepting controversial diagnoses.

What the DDA has effectively achieved is the imposition into law of the medical model's assumption of non-responsibility. It is an outcome that creates a number of possible problems. The most obvious perhaps is that the power of providers to encourage individuals to take responsibility for their conduct through conditionality in their housing provision is weakened. Protected by the legislation, at least in the absence of a risk to health or safety, an individual that might be judged capable of exercising responsible moral agency will no longer be amenable to exclusion from social housing as a technology of self. Nor will it possible to discipline him through the act of exclusion itself. Arden, however, has a different concern. His suggestion is that the legislation harms not only housing providers but, ironically, the mentally disordered themselves. He notes first the possible negative impact of the DDA upon perceptions of the mentally disordered. Enabling them to avoid responsibility for their anti-social conduct, where it may be deemed to exist under a moral adjudication, might

lead to hostility towards those assumed to have unfairly 'got away with it'. He then goes on to question whether it may patronise the mentally disordered to treat them in this way. To patronise, as to condescend, is to behave as if one is on equal terms with another person, whilst maintaining an attitude of superiority. Whilst the legislation ostensibly promotes the equality of the mentally disordered, in practice it seems to confirm their inferiority by assuming, prejudicially, that they are inherently non-responsible agents.

Securing the dignity of minority groups lies at the heart of anti-discrimination law.[141] The enactment of the DDA was expected by the Disability Rights Movement to secure dignity for the disabled by promoting their equality. Brian Doyle, for example, argued as follows in support of civil rights:

> 'Throughout history disabled people have experienced social discrimination, segregation and exclusion. They have been characterized as incomplete or defective human beings, subjected at one extreme to neglect, persecution and death, and at the other extreme to charity, social welfare and paternalism'.[142]

By treating non-responsibility as the natural concomitant of a mental disorder, however, the DDA arguably characterises protected individuals indiscriminately as incomplete or defective human beings. The blanket protection from exclusion from social housing provided to them, at least where they do not

constitute a risk to health or safety, appears to amount then to just the sort of paternalism that these campaigners have sought to prevent. Interestingly, commentators are also increasingly disillusioned by the medical model itself, for impinging upon the dignity of the mentally disordered in this way. As Veatch points out:

> 'They recognise that to place an individual in the medical model is to remove blame, but to remove blame is to remove responsibility, and to remove responsibility is to challenge the dignity of the individual'.[143]

The DDA restricts the opportunity for social landlords to encourage the mentally disordered to take responsibility for their conduct through conditionality of housing provision, either as a technology of self or as a disciplinary technique. What is interesting is that this restriction appears to extend the DDA beyond the appropriate boundaries of anti-discrimination legislation. The primary liberal justification for contemporary discrimination law is the promotion of equal treatment of those who, because of a particular status, would otherwise be treated unjustly less favourably than others.[144] Sandra Fredman expands upon this conception of equality:

> 'A key contribution of liberal equality has been its insistence that individuals should be judged according to their personal qualities. This basic tenet is contravened if individuals are subjected to detriment on the

basis only of their status, their group membership, or irrelevant physical characteristics'.[145]

A particular protected 'status' should not form the basis of less favourable treatment because it is extrinsic to a person's 'personal qualities': it is irrelevant because it has no bearing upon the merits (or demerits) of the individual himself. The distinction between status and personal quality is an uncontroversial dichotomy when applied to physical conditions such as race and sex. In relation to mental disorder, however, the distinction becomes blurred by the question of responsibility. If an individual is adjudicated as responsible for conduct, notwithstanding diagnosis of a causal mental disorder, it is arguable that his anti-social conduct should be treated as a personal quality, rather than part of his status as a disabled person. It should therefore appropriately form the basis of the same treatment as non-disabled individuals who behave in the same way.

It is notable, finally, that the framers of the DDA appear to have problematized this assumption of non-responsibility themselves. During the passage of the DDA through Parliament, William Hague made clear that he would ensure that 'psychopathic or antisocial disorders and addictions', such as 'kleptomania, pyromania, paedophilia and personality disorders' would not be protected by the legislation.[146] The Disability Discrimination (Meaning of Disability) Regulations 1996 provided consequently that certain personality disorders - a tendency to set fires, to steal or to physical or sexual abuse,

exhibitionism or voyeurism - were excluded from the meaning of disability,[147] together with addictions to alcohol, nicotine or other substances, unless caused by medical treatment.[148] Of course, the 1996 Regulations clearly were not aimed at securing the dignity of the mentally disordered. Instead, imposing responsibility upon these particular individuals reflects a knee-jerk, politically-motivated moral adjudication of certain social demons who would attract public outrage should they be allowed the benefits of protection from discrimination. What the exceptions do reveal though is a suspicion of the medical status of personality disorders. Further, the exclusion of addictions, aside from those not brought about by the individual himself, suggests subscription to the theory of meta-responsibility. However, the regulations do not exclude all personality disorders. Nor do they seem to deal with questions of responsibility that might arise from dual diagnosis. Even if the substance misuse amounts to an addiction, which will not always be the case, anti-social behaviour will still be related to some extent to the underlying medical condition and will therefore fall within the ambit of the DDA.

(6) Reprioritising welfarism?

The accusation that the DDA patronises the mentally disordered by freeing them from responsibility for their conduct reflects the concern of advanced liberalism with the fostering of responsible moral agency. It is questionable, however, whether an adjudication of moral responsibility on the

part of these individuals is best responded to through conditionality in housing provision. That responsibility can be causally attributed to an individual does not necessarily provide grounds for the blame of that individual.[149] It is another question entirely whether he should be subjected to exclusion from his home as a result. We have seen that 'anti-social' individuals protected by the DDA share one important characteristic: they are at particular risk of social exclusion because their mental impairments substantially affect their capacity to carry out day-to-day activities. As the SEU report suggests, to tackle the social exclusion experienced by the mentally disordered it is necessary to get the basics of housing provision right. Encouraging responsible moral agency through conditionality is of little value relative to this objective. It is contended then that, in the context of conditionality at least, the DDA is a welcome return to welfarism within the sector.

It is questionable too whether the assumption of non-responsibility in these circumstances is necessarily at odds with the aims of anti-discrimination legislation. In fact, equal treatment is not the only appropriate objective for such instruments. Departure from the principle is often justified as a way to ensure substantive or redistributive goals.[150] Collins develops this idea by suggesting that legislators should be able to depart from the principle of equality when to do so promotes the distributive aim of greater social inclusion.[151] It might be argued then that departure from the principle of equality treatment is warranted in order to ensure that the mentally disordered are provided with the housing services required to engage effectively with

society, whether or not this prevents them from taking responsibility for their actions through conditionality in their housing provision.[152] We have seen that in this instance the DDA promotes less favourable treatment of the minority, rather than majority, group. It operates as such as a source of positive discrimination in favour of the mentally disordered. Indeed, Arden's argument that it is patronising towards minority groups is often directed towards legislation which explicitly engages in affirmative action. It is contended that this outcome was clearly unintended by the framers of the DDA. However, under the redistributive objective of social inclusion, it might be argued that quality of outcome (securing adequate housing) justifies more favourable treatment of the minority group (precluding consideration of their responsibility for anti-social conduct).

Of course, the re-prioritisation of welfarism through anti-discrimination legislation not only requires that individuals are absolved from responsibility for their conduct through conditionality, but that providers and other residents underwrite the risks that they might pose. We have seen that the Court of Appeal in *Romano* acted to allow providers to justify less favourable treatment on grounds of the low-level risks associated with anti-social behaviour. It might be argued finally, however, that the benefit of secure housing for the mentally disordered, the dubious practical benefits of exclusion of the mentally disordered from social housing for anti-social behaviour, and additionally the fact that only those dependent upon the tenure for their accommodation are liable for the loss of their home on ground of their conduct,[153] supports a higher

justificatory risk standard than that set by the Court. Indeed, whilst we have seen that it is the human right of other residents to be protected from low-level disorder, legislation that demands that social landlords and other residents underwrite a higher proportion of the risks associated with mental disorder will still satisfy the European Convention. It is clear that a wide margin of appreciation exists for Parliament to legislate in areas of social policy, allowing for the rights and interests of others.[154] The interest in securing stable housing of those whose mental impairment makes them particularly vulnerable to social exclusion is surely proportionate in these circumstances.

(7) Conclusion

This paper has explored the restrictions imposed by sections 22 to 24 of the DDA upon the governance of anti-social tenants through conditionality in housing provision. It has contended that the legislation conflicts with the objectives of advanced liberal housing policy, by reprioritising the need of the mentally disordered for social housing above the management of risk, and the shaping of responsible moral agency, through exclusion. It has explored in particular the argument that to absolve the mentally disordered indiscriminately from the obligations of conditionality is an affront to their dignity because many are capable of taking responsibility for their conduct. It has suggested, however, that social inclusion of the mentally disordered through the securing stable tenancies is of such fundamental importance that they should be

exempt from conditionality. This should still be subject to a risk justification, but arguably set at a higher standard than that currently set by the Court of Appeal in *Romano*. Moreover, it is not internally inconsistent for anti-discrimination legislation to engage in positive discrimination by preventing landlords from excluding individuals in this way. There may be a place then for the protections currently afforded under the DDA to the mentally disordered threatened with exclusion from rented housing on grounds of their anti-social conduct.

We have seen, however, that numerous other problems are created for housing providers by sections 22 to 24. In relation to the control of anti-social behaviour, we saw earlier that the legislation may preclude social landlords from enforcing injunctions or ASBOs against the mentally disordered. It is suggested that the DDA has extended here beyond its appropriate remit. The focus of sections 22 to 24 is the support of access to premises. Neither the imposition of an injunction or ASBO impinges upon this objective. The inclusion of these tools should be seen instead as an unintended consequence of the overly broad notion of 'detriment' employed by the legislation. A further concern is that supported housing providers may be prevented from evicting or refusal to allocate in the best interests of the individual or the housing project. This may have to be dealt with through an exception for such projects. Finally, I want to return to a concern, raised earlier, that in the absence of an economic justification for less favourable treatment landlords are precluded by the DDA from evicting individuals from social housing for rent arrears on evidence of a causal mental impairment. This paradigm is particularly susceptible to criticism

under advanced liberal housing policy. It can be criticised first on grounds of risk to the financial viability of a particular housing organisation. Without modification such an application of DDA may well give rise to a challenge under Protocol 1, Article 1 of the European Convention,[155] as a landlord will effectively be deprived of his property without compensation. Moreover, the DDA also provides no opportunity for consideration of the responsibility of an individual for his or her condition. The DDA may once again be said to patronise him, by associating classification of a mental disorder with an absolute inability to manage one's financial affairs.[156]

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[1] The 2005 Act is now partially in force: Disability Discrimination Act 2005 (Commencement No 1) Order 2005.
[2] C Gooding, *Blackstone's guide to the Disability Discrimination Act 1995* (London: Blackstone Press, 1995), p 2.
[3] [2004] EWCA Civ 834.
[4] See generally M Foucault, 'Governmentality' in G Burchell, C Gordon and P Miller (eds) *The Foucault Effect: Studies in Governmentality* (Hemel Hempstead: Harvester Wheatsheaf, 1991), pp 87-104.
[5] N Rose, 'Governing "advanced" liberal democracies' in A Barry, T Osborne and N Rose (eds) *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (London: UCL Press, 1996), pp 37-64. D Cowan and A Marsh, 'From need to choice, welfarism to advanced liberalism? Problematics of social housing allocation' (2005) 25(1) Legal Studies 22.
[6] See A Giddens, *The consequences of modernity* (Stanford: Stanford University Press, 1990); U Beck, *Risk society: towards a new modernity* (London: Sage, 1992); B Hudson, *Justice in the Risk Society* (London: Sage, 2000); P O'Malley, *Risk, uncertainty and government* (London: Glasshouse, 2004). For the specific relationship between risk and crime control see R Ericson and S Haggerty, *Policing the risk society* (Oxford: Clarendon, 1997); P O'Malley, *Crime and the risk society* (Aldershot: Ashgate, 1998).
[7] SEU, *Mental health and social exclusion: the SEU report* (London: ODPM, 2004).
[8] Ibid, p 85.
[9] A Murie, 'The social rented sector, housing and the welfare state in the UK' (1997) 12 Housing Studies 437.
[10] W Barr and N Glover-Thomas, *The role of charities in housing the mentally vulnerable* (Liverpool: Charity Law Unit, Liverpool University, 2005).
[11] Home Office, *Respect and responsibility: taking a stand against anti-social behaviour* (London: Home Office, 2003).
[12] Crime and Disorder Act 1998, s 1.
[13] Recent research on the anti-social behaviour case files of social landlords revealed that 18 per cent showed evidence of mental disorder: C Hunter, J Nixon and S Shayer, *Neighbour nuisance, social landlords and the law* (Coventry: CIH, 2000), p 19.
[14] In *Romano*, Ms Romano was diagnosed with a recurrent depressive disorder, whilst Ms Samari was classified as having a personality disorder. The defendant in *Croydon LBC v Moody* [1998] EWCA Civ 1683, another set of possession proceedings discussed below, was said to suffer from a complex personality disorder exacerbated by developing dementia. Research suggests that the usual complaint arising from mental disorder is excessive noise: Barr and Glover-Thomas, above n 10, p 55.
[15] MIND, *Mental health and social exclusion: the Mind response* (unpublished, 2003), p 35 (available at www.mind.org.uk).
[16] M Bright, 'Charity pleads for tolerance as autistic youngsters face ASBOs', The Observer, 22 May 2005.
[17] DTLR, *Tackling anti-social tenants* (London: DTLR, 2002). There has been a move away, however, from government policy defining anti-social behaviour as a housing problem: C Hunter and J Nixon (2001) 'Social Landlords' Responses to Neighbour Nuisance and Anti-social Behaviour: From the Negligible to the Holistic?' (2001) 27(4) Local Government Studies 89-104.
[18] Created by the Anti-social Behaviour Act 2003, s 12.
[19] Social landlords for this purpose are LHAs, Registered Social Landlords and Housing Action Trusts.
[20] D Cowan, *Housing law and policy* (Basingstoke: Macmillan, 1999), p 492.
[21] HA 1996, ss 144 and 148.
[22] HA 1996, Pt 5, Ch 3.
[23] HA 1996, ss 125A-B.
[24] HA 1985, s 82A; HA 1988, s 6A.
[25] HA 1996, s 160A(7). Allocations by other social landlords are not regulated by statute.
[26] ODPM/DoH, *Homelessness code of guidance* (London: ODPM, 2002), para 7.14.
[27] MIND, above n 15.
[28] The SEU's report concentrates entirely upon the risk of eviction for non-payment of rent, experienced by one in four mentally disordered tenants. This is understandable given that rent arrears make up 90 per

cent of possession cases, whilst anti-social behaviour accounts for just 3 per cent: A Warnes, M Crane, N Whitehead and R Fu, *Homelessness Factfile* (London: Crisis, 2003).
[29] [2004] EWCA Civ 834.
[30] D Cowan, R Gilroy and C Pantazis, 'Risking Housing Need' (1999) 26(4) JLS 403.
[31] D Cowan, 'Accommodating community care' (1995) 22(2) JLS 212.
[32] HA 1996, s 167(2)(d) and s 189(1)(c). In the case of homelessness, priority must be given to those who are vulnerable as a result of mental illness. Under general allocation schemes, 'reasonable preference' should be given to those 'who need to move on medical or welfare grounds'.
[33] N Rose, 'Government and control' (2000) 40 Brit J of Criminology 321-339.
[34] See A Murie, 'Linking Housing Changes to Crime' (1997) 31(5) Social Policy & Administration 22-36; Papps, 'Anti-social behaviour strategies: individualistic or holistic?' (1998) 13(5) *Housing Studies* 639; E Burney, *Crime and Banishment: Nuisance and Exclusion in Social Housing* (Winchester: Waterside Press, 1999); Cowan and Pantazinis, 'Social landlords as crime control' (2001) 10(4) Social and Legal Studies 435; P Card, 'Managing anti-social behaviour – inclusion or exclusion?' and C Hunter, 'Anti-social behaviour and housing – can law be the answer?' in D Cowan and A Marsh (eds) *Two Steps Forward: Housing Policy into the New Millenium* (Bristol: Policy Press, 2001).
[35] S Butler, *Access denied* (London: Shelter, 1998), p 12.
[36] M Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999), pp 149-175.
[37] Ibid., p 165.
[38] J Flint, 'The responsible tenant: housing governance and the politics of behaviour' (2004) 19(6) Housing Studies 893-909; J Flint, 'Reconfiguring agency and responsibility in social housing governance in Scotland' (2004) 41(1) Urban Studies 115-172.
[39] See Cowan and Marsh, above n 5.
[40] J Flint, 'Housing and ethopolitics: constructing identities of active consumption and responsible community' (2003) 32(3) Economy and Society 611 at 615.
[41] An influential proponent of conditionality in welfare to reinvigorate a sense of moral responsibility is Frank Field MP: F Field, *Neighbours from hell: the politics of behaviour* (London: Politico's, 2003), ch 9. For recent support for conditionality see A Deacon, 'Justifying conditionality: the case of anti-social tenants' (2004) 19(6) Housing Studies 911. For other examples of conditionality of welfare see G McKeever, 'Social security as criminal sanction' (2004) 26(1) JSWFL 1.
[42] R Walker, 'The changing management of social housing: the impact of externalisation and managerialisation' (2000) 15(2) Housing Studies 281-299.
[43] Cowan et al, above n 30.
[44] The Homelessness Act 2002, for example, now enables LHAs to deem an individual ineligible for allocation of housing, notwithstanding his need, if satisfied that (a) he, or a member of his household, has been guilty of unacceptable behaviour serious enough to make him unsuitable to be a tenant of the authority; and (b) in the circumstances at the time his application is considered, he is unsuitable to be a tenant of the authority by reason of that behaviour (HA 1996, s 160A).
[45] Although not extending to consideration of the outcome of a future application for rehousing: *Bristol CC v Mousah* (1998) 30 HLR 32; *Shrewsbury and Atcham BC v Evans* (1997) 30 HLR 123.
[46] *Woking BC v Bistram* (1993) 27 HLR 1.
[47] HA 1985, s 85A; HA 1988, s 9A.
[48] R Levitas, *The inclusive society? Social exclusion and New Labour* (Basingstoke: Macmillan, 2004), pp 14-21. The notion of the 'moral underclass' is an analysis shared by commentators on both the left and right: see C Murray, *The emerging British underclass* (London: IEA, 1984) and W Wilson, *The truly disadvantaged* (Chicago: University of Chicago Press, 1987).
[49] Home Office, above n 11, p 17.
[50] A Haworth and T Manzi 'Managing the underclass: interpreting the moral discourse of housing management' (1999) 36(1) Urban Studies 153.
[51] Home Office, above n 11, p 7.
[52] A Deacon, *Perspectives on welfare* (Buckingham: Open University Press, 2002).
[53] Murray, above n 48, p 86.
[54] A Brown, 'Anti-social behaviour, crime control and social control' [2004] 43(2) Howard Journal 203 at 207.

[55] T Parsons, *The social system* (London: Tavistock, 1952), pp 436-437; Flew, 'Mental health, mental illness and mental disease: the medical model' in (ed) Bean, *Mental illness: changes and trends* (New York: John Wiley, 1983).
[56] R M Veatch, 'The medical model: its nature and problems' in R B Edwards (ed) *Ethics of psychiatry: insanity, rational autonomy and mental health care* (Amherst: Prometheus Books, 1997), p 114.
[57] P Rabinow, *The Foucault Reader* (London: Penguin, 1991).
[58] See generally H Brayne and H Carr, *Law for Social Workers* (Oxford: OUP, 2005), 515-566.
[59] Brayne and Carr, above n 58, p 551-552.
[60] Warnes et al, above n 28.
[61] Cowan et al, above n 30, p 410.
[62] C Allen, 'Desperately seeking fusion: on 'joined-up thinking', 'holistic practice' and the new economy of welfare professional power (2003) 54(2) Brit J of Sociology 287; C Allen and N Sprigings, 'Housing policy, housing management and tenant power in "the risk society" – some critical observations on the welfare politics of "radical doubt" (2001) 21(3) Critical Social Policy 384-412.
[63] See SEU, *Policy Action Team 8: anti-social behaviour* (London: ODPM, 1998), p 51.
[64] Hunter et al, above n 13, ch 13.
[65] S Campbell, *A review of anti-social behaviour orders* (London: Home Office, 2002), p 37.
[66] See H Carr, '"Someone to watch over me": making supporting housing work' (2005) 14(3) Social and Legal Studies 387-408.
[67] R Dean and T Craig, '"Pressure points" Why people with mental health problems become homeless' (London: Crisis, 1999), pp 3-4.
[68] On the problems of inter-agency partnership generally, see A Crawford, *The local governance of crime: Appeals to community and partnership* (Oxford: Clarendon Press, 1997).
[69] Hunter et al, above n 13, p 32.
[70] Papps, above n 34, at 645. My italics.
[71] For an early criticism of the concept of anti-social behaviour, and an attempt to unpack it, see Scott and Parkey, 'Myths and realities: anti-social behaviour in Scotland' (1998) 13(3) Housing Studies 325.
[72] Veatch, above n 56, pp 114-116.
[73] J Feinberg, 'What's so special about mental illness?' in J Feinberg, *Doing and deserving* (Princeton: Princeton University Press, 1970). It tends to form the basis of jurisprudential inquiry in relation to the criminal defence of insanity: H L A Hart, *Punishment and responsibility* (Oxford: OUP, 1968), pp 188-191.
[74] See A Kenny, *Freewill and responsibility* (London: Routledge, 1971), pp 22-45.
[75] Feinberg, above n 73, p 273.
[76] The M'Naughton Rules governing the defence of insanity in English law allow for exculpation on grounds of delusion, it does not in the case of an irresistible impulse: Kopsch (1925) 19 Cr App R 50.
[77] Feinberg, above n 73, p 273.
[78] P Bjorklund, '"There but for the grace of God": moral responsibility and mental illness' (2004) 5(3) Nursing Philosophy 188-200.
[79] E Mitchell, *Self made madness: rethinking mental illness and criminal responsibility* (Aldershot: Ashgate, 2003).
[80] D Robinson, *Wild Beasts and Idle Humours* (Cambridge, Mass.: Harvard University Press, 1996), p 237.
[81] G Williams, *Textbook of Criminal Law* (London: Stevens & Sons, 1983), p 692.
[82] Ch V, F60.2.
[83] T Szasz, *The myth of mental illness* (London: Paladin, 1972).
[84] J Sharkey, 'Personality disorders are arbitrary medicalisation of human variation' (1999) BMJ 318(7186), 20 Mar, p 806.
[85] P Moran, *Maudsley discussion paper No 7: Should psychiatrists treat personality disorders?* (London: King's College, 2000).
[86] M J Crawford et al, 'Most psychiatrists oppose plans for new mental health act' (2001) BMJ 322(7290), 7 April, p 866.
[87] Bjorklund, above n 78.
[88] S A Spence, 'Personality disorder: agency and responsibility' (2001) 179 Brit J of Psychiatry 558.
[89] (1999) 31 HLR 738.

[90] (1999) 31 HLR 738 at 742.
[91] DDA, s 22(1).
[92] DDA, s 22(3).
[93] DDA, s 22(4).
[94] DDA, s 1(1) and Sch 1. A mental impairment will do so if it affects memory or the ability to concentrate, learn or understand; or perception of the risk of physical danger. See generally G James, 'An unquiet mind in the workplace: mental illness and the Disability Discrimination Act 1995' (2004) 24 LS 516.
[95] [2003] L&TR 26.
[96] [2004] EWCA Civ 834.
[97] [2004] EWCA Civ 834 at [19].
[98] DDA, s 24.
[99] [1999] IRLR 318.
[100] DDA, ss 24(2) and 24(3)(a).
[101] [2004] EWCA Civ 834.
[102] *Shamoon v Chief Constable of the RUC* [2003] UKHL 1 at [35].
[103] HA 1996, ss 152A-E.
[104] Crime and Disorder Act 1998, s 1.
[105] [2004] EWCA Civ 834 at [116].
[106] A Chadwick, 'Knowledge, power and the Disability Discrimination Bill' (1996) 11 Disability and Society 25.
[107] B Doyle, 'Enabling legislation or dissembling law?' (1997) 60 MLR 64.
[108] Doyle, above n 107, at 78.
[109] A Lawson, 'Selling, letting and managing premises: new rights for disabled people' [2000] Conveyancer 128 at 152.
[110] [2004] EWCA Civ 834 at [67].
[111] Ibid at [121].
[112] Hansard HC, Standing Committee E, cols 452-454 per William Hague MP.
[113] See, however, some of the problems identified by the Court of Appeal: [2004] EWCA Civ 834 at [115]-[123].
[114] Barr and Glover-Thomas, above n 10, p 67.
[115] There is at least one county court case in which such an argument has succeeded: *Liverpool City Council v Slavin*, 29 April 2005, *Legal Action* (July 2005).
[116] Barr and Glover-Thomas, above n 10, pp 66-69.
[117] Ibid, p 67.
[118] [2004] EWCA Civ 834 at [53].
[119] [2004] EWCA Civ 834 at [117].
[120] [2004] EWCA Civ 834 at [69].
[121] *Newcastle City Council v Morrison* [2000] L&TR 333; *Sheffield City Council v Jepson* (1993) 25 HLR 299. Although see *Canterbury City Council v Lowe* (2001) 33 HLR 583, which suggests that the potential success of an injunction in controlling conduct might justify a suspended possession order.
[122] [2004] EWCA Civ 834 at [60].
[123] Eg Health and Safety at Work Act 1974.
[124] [2003] L&TR 26 at [21].
[125] See Home Office, above n 11, p 3.
[126] *Hatton v UK* (2003) 15 BHRC 259.
[127] *Botta v Italy* (1998) 26 EHRR 241.
[128] *López Ostra v Spain* (1995) 20 EHRR 277 at [51]. See also *Moreno Gómez v Spain*, 16 November 2004, App No 4143/02.
[129] *Ashworth v UK* [2004] 3 EHRLR 330.
[130] To this end, the courts have a supervisory role over legislation under s 3 of the Human Rights Act 1998.
[131] Though 'trivial' harm to health must be disregarded: [2004] EWCA Civ 834 at [75].
[132] [2004] EWCA Civ 834 at [116].

[133] *United Kingdom v Council* [1996] ECR I-5755, para 15. See B Fitzpatrick, 'Straining the definition of health and safety?' [1997] 26 ILJ 115.
[134] Children Act 1989, s 22(6).
[135] *R (on the application of M) v Sheffield Magistrates' Court* [2004] EWHC 1830.
[136] A Arden, 'Who care in, and who cares about, the community?' [2004] 7(5) JHL 65 at 67.
[137] Ms. Romano herself had failed to co-operate with her own treatment programme: '[h]er motivation to help herself was poor, and she did not take her medication regularly': [2004] EWCA Civ 834 at [77].
[138] *Goodwin v The Patent Office* [1999] ICR 302 at 309.
[139] *Morgan v Staffordshire University* [2002] ICR 475 at 486.
[140] DDA 2005, s 18(2).
[141] S Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002), pp 17-19.
[142] B Doyle, *Disability, discrimination and equal opportunities* (London: Mansell, 1995), p 1.
[143] Veatch, above n 55, p 115.
[144] I M Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), Ch 4.
[145] S Fredman, above n 141, p 66.
[146] Hansard HC, 7 February 1995, col 105 per William Hague MP.
[147] Reg 4(1).
[148] Regs 2 and 3.
[149] T Scanlon, *What we owe to each other* (London: Belknap, 1998).
[150] See Fredman, above n 141, pp 20-22.
[151] H Collins, 'Discrimination, equality and social inclusion' (2003) 66(1) MLR 16.
[152] Collins, above n 151.
[153] Haworth and Manzi, above 49, p 160; Hunter, above n 12, p 234.
[154] *Mellacher v Austria* (1990) 12 EHRR 391; *R (on the application of McLellan) v Bracknell Forest BC* [2002] QB 1129.
[155] *Mellacher v Austria* (1990) 12 EHRR 391; *Scollo v Italy* (1996) 22 EHRR 514.
[156] Note that the DDA makes provision for addition to the 'fixed list' of justifications through secondary legislation: DDA, s 24(5). An economic justification can be found in the justifications for discrimination by public authorities incorporated in the DDA by the Disability Discrimination Act 2005: s 21D(4).